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JAN 7 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1942

Nos. 635

MOORE-McCORMACK LINES, INC.,
Petitioner,

against

EDWARD FOSTER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

CORYDON B. DUNHAM,
Attorney for Petitioner.

VING L. EVANS,
UGENE J. DAVIDSON,
Of Counsel.

Dated, December 31, 1942.

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Nos.....

MOORE-McCORMACK LINES, INC.,
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EDWARD FOSTER,
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Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Moore-McCormack Lines, Inc., the petitioner herein, prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit to review a decision of that Court rendered on December 7, 1942 (R. p. 282), affirming a judgment of the United States District Court for the Southern District of New York in favor of the respondent, Edward Foster, and against the petitioner, Moore-McCormack Lines, Inc.

Opinion Below

The opinion of the Circuit Court of Appeals, not yet reported, is set forth at page 282 of the Record.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented

1. Whether the Suits in Admiralty Act, 46 U. S. C. §§ 741, 742 provides the exclusive remedy to recover for injuries arising out of the operation of a merchant vessel owned by the United States and leased for operation by it to a private corporation.

2. Whether the fact that the United States would not be responsible for any damages which may be recovered for injuries arising out of the operation of a merchant ship owned by it and leased by it for operation to a private corporation, precludes the Suits in Admiralty Act, 46 U. S. C. §§ 741, 742 from providing the exclusive remedy for such injuries so sustained.

3. Whether the purpose of the Suits in Admiralty Act, 46 U. S. C. §§ 741, 742 was to relieve the United States of the inconvenience resulting from seizures of government owned vessels when operated under a plan chosen by it rather than operated by one of the government agencies or government corporations partially or wholly owned by the United States.

4. Whether the operator of a merchant vessel is *ipso facto* guilty of negligence upon the failure of a light to continue to shine, where there is no evidence showing why the light went out or that the defendant had knowledge (either actual or constructive) that the light no longer continued to shine.

5. Whether the errors made during the trial and/or the conduct of the trial were so highly prejudicial to petitioner's rights as to warrant a new trial.

Statutes Involved

The pertinent provisions of the Suits in Admiralty Act, 46 U. S. C. §§ 741, 742 and of the Act of Congress, known as the Merchant Marine Act, approved June 5, 1920, 46 U. S. C. § 688 are set forth in the Appendix.

Statement

THE PARTIES: The petitioner is a steamship company which operated the S/S "Uruguay" and other luxury liners which had been reconditioned by the United States Maritime Commission and placed in operation by the United States Government to ply between the port of New York and ports in South America. The Appellate Court treated the S/S "Uruguay" as a government owned vessel (R. p. 284). The respondent was a member of the crew (assistant Engineer) of the S/S "Uruguay" from September, 1938 to April, 1940 when he became very ill with rheumatic fever, necessitating his removal from the vessel by the petitioner at Rio De Janeiro (R. pp. 22, 229). He was 53 years of age and had been going to sea for approximately 27 years (R. pp. 20, 21, 131, 132).

The respondent ostensibly avoided a trial in Admiralty by suing the petitioner in the common law side of the United States District Court for the Southern District of New York where he had a jury trial.

Two causes of action were pleaded, the first charging negligence, the second seeking maintenance and cure (R. pp. 3, 4, 5, 6).

The answer denied the allegation of negligence but admitted an allegation that the petitioner chartered or leased the vessel from United States of America (R. pp. 6, 7, 8).

The complaint alleged that the respondent, during the course of his employment as assistant engineer on the vessel, received personal injuries due to the fault or neglect of the petitioner in that a grating in the fire room was left open without proper safeguards and with insufficient lighting at the particular time and place (R. pp. 4, 5).

The respondent had difficulty in deciding as to the date of his accident and in fixing the date of his accident (R. pp. 62, 63, 64, 65, 232, 252 to 256). The complaint gave no date. By his bill of particulars, the time was fixed as October, 1939 (R. p. 13). He testified in his examination before trial that the date of the accident was October, 1939 (R. p. 63). Respondent was unable to give the date of his accident while testifying at his trial (R. pp. 64, 87, 251). At the time of the trial, respondent was still suffering from the effects of the rheumatic fever and rheumatic arthritis which he had when he was carried off the vessel in April, 1940 (R. pp. 130, 131, 132). The Jury's award in the negligence case was $9,000. The verdict on the maintenance and cure count was "no award" (R. p. 266).

Respondent was a superior officer on duty and in charge of the fire room when the vessel was at Santos, Brazil, in

June, 1939 (R. pp. 24, 25, 49). He testified that he fell into an opening in the floor 3 feet deep where a grating had been raised (R. pp. 27, 75). He stated that, although he was carrying a flashlight he could not see because the light which illuminated that part of the after fire room where he was walking was not shining (R. pp. 27, 46, 47, 48).

Since the only person to whom respondent allegedly reported the accident was dead at the time of the trial, petitioner's proof was necessarily circumscribed (R. p. 223). Witnesses did, however, testify that regular inspections of the lights were made to see that they were properly functioning (R. pp. 70, 71, 75, 76, 102). There was proof that such inspection was made at the beginning of the watch (R. p. 102). Respondent corroborated this proof by admitting the inspections (R. pp. 70, 71, 75, 76). There was no evidence that petitioner had any knowledge that the light which was shining at the start of the watch, no longer continued to shine.[1] Nor was there any evidence as to how long the light was out so as to impute constructive knowledge.[2] Similarly, there was no evidence offered to show that petitioner had any knowledge (active or constructive) of the opening. There was no proof as to who removed the grate or how long the hole remained uncovered.[3].

The appeal which the petitioner took to the United States Circuit Court of Appeals for the Second Circuit was argued October 19, 1942. The decision affirming the judgment in favor of respondent was rendered December 7, 1942.

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[1] Respondent and his witnesses, the only two persons present in that part of the ship (fol. 266), both stated they did not know when the light went out or how long it remained out (fol. 77).

[2] Constructive notice would manifestly be insufficient in view of the declaration of the bill of particulars (paragraph 8e), charging petitioner with actual knowledge. This bill, served pursuant to order of the District Court, charged the petitioner with having actual knowledge of the alleged condition.

[3] Respondent declared he did not know who removed the grate or when it was removed (fols. 74, 75, 210).

Reasons for Granting the Writ

1. The questions presented in the instant case are of the utmost public importance.

Today, because of the world-wide struggle in which our country is involved, merchant shipping is perhaps our most essential need. Toward this end, any private litigation that needlessly interferes with the free movement of such shipping is of vital public concern, transcending any benefits or injury to the private litigants. Heretofore, there has been no decision of this or any other Court, settling, with finality, the question whether the Suits in Admiralty Act, 46 U.S.C. §§ 741, 742, provides the exclusive remedy for injuries resulting from the operation of merchant shipping owned by the United States and leased by it for operation to a private corporation. This Court has already ruled on certain problems arising under the Act, *i. e.*, its applicability to those instances wherein the United States, its wholly owned corporations or certain private operating companies operated the vessels. (*Johnson* v. *Fleet Corp.*, 280 U. S. 320; *Fleet Corp.* v. *Rosenberg Bros.*, 276 U. S. 202.) In each instance it ruled that the Act provides the exclusive remedy. Recently this Court granted *certiorari* in the case of *Brady* v. *Roosevelt S.S. Co. Inc.*, argument thereon having been heard December 18, 1942. The Court below, by ruling herein that the Act does not apply when the ship is leased by the United States to a private corporation for operation has permitted seamen to file a libel *in rem* in the Admiralty Courts and accordingly to seize the ship. Whether the statute is to be thus circumscribed is a question of vital public interest, not only to the many operators of merchant shipping; to the thousands of seamen and other possible claimants; but to the entire public and the country at large. It is

submitted that public interest will be promoted by the settlement in this Court of the questions involved.

2. The further issue of whether the Act is limited to such instances wherein the United States would be liable for any recovery sustained is for the same reasons of vital public interest.

3. The decision of the Circuit Court that the Act is not applicable to cases wherein the United States has leased the vessel to a private concern for operation is not in harmony with the principles laid down by Congress; by the decisions of this Court in the *Rosenberg* and *Johnson* cases, *supra;* the decision of the same Circuit Court in the *Brady* case 128 Fed. (2d) 169, 170, and with the decision of the New York Court of Appeals in the case of *Shea* v. *Export S.S. Corp.,* 253 N. Y. 17. Similarly the ruling that the responsibility of the government for the damages is the governing criterion, is in direct contradiction to the previous ruling of the Court below in the *Brady* case, *supra.*

4. A further issue of public importance is the Circuit Court's ruling that a ship operator is guilty of negligence *ipso facto* for the failure to keep a light shining, where there is no evidence to indicate it knew the light no longer burned. The case presents a problem quite apart from the usual question of whether the defendant, having cause to believe a dangerous situation exists, does not rectify it. The question is, does the mere existence of the situation unbeknownst to the operator create negligence. Such problem is of general interest in view of the ever growing scope of our merchant marine, and should be adjudicated with finality. The above issue is in apparent conflict with the previous rulings of this Court in *Engle* v. *Davenport,* 271 U. S. 33 and *Lingren* v. *U. S.,* 281 U. S. 38. It is also apparently

in conflict with the case of *Bryant* v. *Vestland*, 52 Fed. (2d) 1078, 1079 (C. C. A. 5).

5. Because the Court below has apparently departed from the settled rules of law which apply in such a case, and because of the conflict between the decision in the instant case, other decisions of the Court below, and decisions of other Circuit Courts, the law has now become confused. It is submitted that the new standard of care sought to be imposed by the Circuit Court should be reviewed and finally settled by this Court.

In conclusion, it is respectfully urged that there is here presented problems of law which vitally affect public interest. These issues do not concern questions of fact, but rather (1) the interpretation of a statute of the United States, and (2) a standard of care owing by the operator of a vessel to a member of the crew of the vessel.

WHEREFORE, your petitioner, referring to the annexed brief in support of the foregoing reasons for review, respectfully prays that this Honorable Court issue a writ of certiorari directing the United States Circuit Court of Appeals for the Second Circuit to certify and send to this Court full and complete transcripts of the records herein to the end that the said cause may be reviewed and determined by this Court as provided by law, and that the judgment of the Circuit Court of Appeals for the Second Circuit may be reviewed and that your petitioner may have such other, further and different relief as to this Honorable Court may seem just.

Dated, New York, December 31, 1942.

MOORE-MCCORMACK LINES, INC.,
Petitioner.

By: CORYDON B. DUNHAM,
Counsel for Petitioner.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Statement

The essential facts are stated in the Petition.

POINT I

The Suits in Admiralty Act, 46 U. S. C. §§ 741, 742, provides the exclusive remedy for injuries arising out of the operation of a merchant vessel owned by the United States and leased by it for operation to a private corporation.

The Court below overlooked the purpose of the Suits in the Admiralty Act (46 U. S. C., §§ 741, 742). This Court has

declared that the purpose of that statute was "* * * to relieve the United States of the inconvenience resulting from seizures" of Government-owned merchant vessels. *Johnson* v. *Fleet Corporation,* 280 U. S. 320, 325. The theory applied by the Court below would permit the seizure of a Government-owned merchant ship chartered to a private vessel operator because the vessel was chartered to such operator. Such theory carried to its logical conclusion would make the Government-owned vessel subject to seizure and delay merely because the Government decided to have the vessel operated under charter rather than by some other method. It was clearly not the intention of Congress to penalize the Government and subject its vessels to seizure because it operated a merchant vessel under one plan, chosen by it, rather than under some other plan.

The Court below has premised its ruling that the Suits in Admiralty Act, does not apply on the theory that a private owner of a merchant vessel leased to a private corporation for operation would not be liable *in rem* under the Jones Act or *in personam;* and further that it is only under the Jones Act that a seaman could sue. This theory manifestly ignores the ancient and basic right of a seaman to file a libel *in rem* in Admiralty seeking damages for injuries sustained as a result of the ship's unseaworthiness. Further, he has a claim against the ship for maintenance and cure, enforceable *in rem* in Admiralty. Both these claims carry the right to seize the vessel. *The Osceola,* 189 U. S. 158, 175. In the instant case, respondent sued for maintenance and cure. He might have alleged the condition of the vessel constituted unseaworthiness, entitling him to a recovery in an action *in rem* in Admiralty. He therefore could have so sued and seized the vessel unless the Suits in Admiralty Act precluded the right. That instead of so

suing respondent chose to sue under the Jones Act does not alter the situation. It is the existence of the right which is determinative of the issue. Thus the Court below was in error in holding as it did.

This Court has already declared that the purpose of the statute was "to relieve the United States of the inconvenience resulting from * * * seizures" *Johnson* v. *Fleet Corp.*, 280 U. S. 320, 325; and to provide a remedy in Admiralty for "adjudicating and satisfying all maritime claims arising out of the possession or operation of merchant shipping of the United States." *Fleet Corp.* v. *Rosenberg Bros.*, 276 U. S. 202. For the Circuit Court to create an exception to this rule would serve no proper purpose and would destroy the very end sought. There can be no question of the Congressional intent. The Act was intended to cover all merchant ships owned by the United States no matter by whom they were operated and all ships operated by the government no matter by whom they were owned. Thus Section 741 is framed in the following equivocal language "*no vessel* owned by the United States * * * or in the possession * * * or operated by or for the United States * * * shall * * * be subject to arrest or seizure."

For the Court below to hold the Act inapplicable is not only to ignore the specific mandate of Congress but the rulings of this Court and what is more important open the door to the seizure of merchant vessels in these times when it is the country's greatest interest to prevent such acts.

Moreover, the decision conflicts with the decision of the same Circuit in *Brady* v. *Roosevelt S. S. Co., Inc.*, 128 Fed. (2d) 169, 170, wherein the Court declared:

> "A prime purpose of the statute was to prevent the seizure in ports of the United States vessels

> owned by the government or its wholly owned corporations in action *in rem*. No distinction was made between seizures from a private operating corporation and from a corporation owned by the government * * *."

An analogous situation was presented to the New York Court of Appeals in *Shea* v. *Export S. S. Corp.*, 253 N. Y. 17. That Court also decreed that the statute barred the action against the private operating corporation.

As for the distinction drawn by the Circuit Court between the instant case and that of *Brady* v. *Roosevelt S. S. Co., Inc., supra*, to wit: "The United States would have been personally liable had it been a private person," we need only point to the express language of the *Brady* case to indicate the error committed.

> "* * * too much regard has been given to the thought that if appellee recovers the judgment will neither be against the government directly or indirectly nor will the United States be compelled to reimburse the agent for damages it may pay * * *. Granted that this is so, it is not decisive for the Suits in Admiralty Act goes beyond the mere protection of any pecuniary interest of the government. A prime purpose * * * was to prevent the seizure * * * of vessels owned by the government * * * in actions *in rem*." (The *Brady* case, p. 170.)

It therefore follows that the decision of the Court below in holding that the Suits in Admiralty Act does not apply in the instant case was erroneous and that the decision of the Circuit Court as well as the judgment of the District Court should be reversed.

POINT II

The operator of a merchant vessel is not guilty of negligence upon the failure of a light to continue to shine where there is no evidence showing why the light went out or that the defendant had knowledge (either actual or constructive) that the light no longer continued to shine.

The Court below in affirming the judgment and verdict of the District Court declared that so long as the scene of the accident was illuminated there was no negligence; the exact words being "the darkness and negligence were dispelled by the light—so long as it lasted." The Court then continued to declare that once the light became extinguished petitioner was *ipso facto* negligent; again the exact words being "Appellant was therefore negligent because it did not show it exercised due care to see to it the light continued to shine." Since there is no evidence to indicate why the light went out or to impute knowledge for petitioner to believe that the light no longer burned, the Court, in effect, ruled that negligence may exist apart from a knowledge of the defective condition. It is respectfully submitted that in so ruling the Circuit Court has departed from the established principles of law and imposed a new standard of care on the operators of merchant shipping.

While it is true there is a duty to maintain proper illumination, the duty is not breached immediately upon the extinguishing of the light. The duty is breached when the defendant has "knowledge or what is deemed in the law to be the same thing; opportunity by the exercise of reasonable diligence to acquire knowledge of peril. *38 Amer. Juris,* § 23, *Sherman & Redfield on Negligence* (re-

vised ed.), § 24. "If what was initially furnished was reasonably safe and adequate and became defective through use * * * it was necessary for knowledge of that fact to be brought home to the officers of the ship before any duty of replacement arose." *Bryant* v. *Vestland*, 52 Fed. (2d) 1078, 1079 (C. C. A. 5).

The Jones Act does not enlarge on the common law rules regarding negligence. *Cortes* v. *Baltimore & Insular Line*, 287 U. S. 367. The burden of proving negligence in respect to the place of injury is on the plaintiff (respondent herein). *Delaware etc. R.R.* v. *Pedersen*, 229 U. S. 146, 148. In the instant case the evidence is that petitioner inspected the lights regularly. Despite respondent's allegation of actual knowledge (Par. 8 E, Bill of Particulars) the record indicates petitioner had no knowledge (either actual or constructive) of the absence of lights (R. p. 26). For the Court below to therefore impose liability because petitioner did not maintain a light is to conflict with the many decisions of this Court, *cf*: *Engle* v. *Davenport*, 271 U. S. 33; *Patton* v. *Texas & P. R.R. Co.*, 179 U. S. 658; *Lingren* v. *U. S.*, 281 U. S. 38.

POINT III

The errors of the trial were so flagrant and highly prejudicial to petitioner's rights as to warrant a new trial.

The petitioner, an operator of American owned ships, comes to this highest Court feeling aggrieved, particularly as to the errors of the trial. It complains that the lower Court has erroneously and tacitly put its stamp of approval on the jury's decision that the rheumatic arthritis of this

53 year old respondent was in some way connected with with his employment on the S/S "Uruguay" (R. pp. 131, 132, 192 to 209, 256, 282, 283, 284).

He was treated for the rheumatic fever in a hospital in Rio De Janeiro until July, 1940 (R. p. 22). His treatment for rheumatic or rhematoid arthritis was continued from July, 1940 to June, 1941 at the U. S. Marine Hospital at Stapleton, Staten Island (R. pp. 126, 127, 220). At the hospitals and while talking to the doctors he emphatically denied that he had received injuries and that his condition was due to an accident (R. pp. 127, 215, 216). The salt air and sea life after 25 years of going to sea, when combined with the attacks of gonorrhea in 1907, 1909 and 1925 affected respondent's resistence to such an extent that he had ordinary or general arthritis in all of his joints (R. pp. 131, 132, 195, 199, 299). See opinions of Dr. Strauss and Dr. Engl. The physicians who treated respondent made no diagnosis of traumatic arthritis. Dr. Arthur A. Michel of the U. S. Government Service brought about a traumatic condition by manipulating respondent's shoulders when he was confined to the U. S. Marine Hospital. Dr. Michel broke the adhesions which had been caused by the arthritis (R. p. 220). In breaking the adhesions, the doctor tore the ligaments in the right shoulder (R. pp. 211, 212, 213, 220).

It would seem that by the affirmance, trial courts may now charge the jury on matters not within the issues embraced within the pleadings. It is asserted that it is erroneous to charge in the alternative; that is, if the jury cannot find for the plaintiff on the premise or theory that a direct blow caused arthritis then the jury may find that a blow aggravated a pre-existing condition of arthritis, when in fact the plaintiff did not have such a pre-existing

condition of arthritis (R. pp. 31, 42, 43, 206). *Carpenter* v. *Baltimore & Ohio Ry. Co.*, 109 F. (2) 375, 379 (C. C. A.); *64 Corpus Juris*, § 746 and § 760.

It is apparent from the opinion that the Appellate Court did not fully realize that the petitioner complained that the Court went outside of the issues and discussed aggravation when a theory of aggravation was diametrically opposed to the respondent's case (R. pp. 3, 4, 5, 206, 266). For, this conclusion is stated as follows, "Appellant objects that this portion of the charge is not warranted by the evidence for there could be no causal connection between the injury in question and the subsequent arthritic condition." The Trial Judge stands charged with full responsibility as to the just outcome of the trial, *Patton* v. *Texas & Pacific Railway Company, supra.*

As was said at page 660 of *Patton* v. *Texas & Pacific Railway Co., supra,* a Judge is not a mere moderator of a town meeting, submitting questions to the jury for a determination, nor simply ruling on admissibility of evidence, but one who in our jurisprudence stands charged with full responsibility. So, with the absence of any accident date, the Trial Court should have dismissed the case. The Trial Court should have at least required the respondent to give the exact date of his accident (R. pp. 63, 64, 65). Failing the established requirement to fix the date of an accident, the Trial Court should have directed a verdict (R. pp. 256, 257). The forthright refusal of the respondent to decide upon a date in June, 1939, after having changed the date of his accident during the trial from October, 1939, served to bar and foreclose the petitioner from complying with what now seems to be the highly exacting requirements of the lower Court as to proof. Although the petitioner could never find out the date of the plaintiff's

accident even during the trial, still according to the opinion it was required to show that it exercised due care to see to it that the light continued to shine at the time of the accident. The opinion states, "Appellant was, therefore, negligent because it did not show that it exercised due care to see to it that the light continued to shine" (R. pp. 282, 283).

CONCLUSION

It is submitted that the serious questions of law vitally affecting public interest is of sufficient importance to require the exercise of this Court's supervisory jurisdiction by a writ of certiorari.

Respectfully submitted,

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EUGENE J. DAVIDSON,
Of Counsel.

Dated, December 31, 1942.

[APPENDIX FOLLOWS]

Appendix

The pertinent provisions of the Suits in Admiralty Act, 46 U.S.C. §§ 741, 742, are as follows:

Section 741—Exemption of United States vessels and cargoes from arrest or seizure.

> No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall, in view of the provisions herein made for a libel *in personam*, be subject to arrest or seizure by judicial process in the United States or its possessions * * *.

Section 742—Libel *in personam*.

> In cases where, if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel *in personam* may be brought against the United States against such corporation as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation.

The pertinent provisions of the Act of Congress, known as the Merchant Marine Act, approved June 5, 1920, 46 U. S. C. § 688, are as follows:

> "any seaman who shall suffer personal injury in the course of his employment may at his election, maintain an action for damages at law, with the right of trial by jury and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply, * * *"

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Respondent.

Brief in Opposition to Petition for Writ of Certiorari.

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Statement.

The complaint sets forth a claim for damages for personal injuries and maintenance and cure by a seaman against his employer, a private steamship operator, predicated upon an accident which resulted through the ship operator's failure to provide a reasonably safe place wherein to work.

The case was tried before Honorable Alfred C. Coxe and a jury on the 19th, 20th and 21st days of May, 1942, in the United States District Court for the Southern District of New York, which jury returned a verdict in

favor of the plaintiff in the sum of Nine Thousand ($9,000.00) Dollars, which included maintenance and cure.

The Trial Court refused to interfere with the verdict.

The reasonableness of the amount is not questioned.

The Circuit Court of Appeals for the Second Circuit, having been composed of Judges Learned W. Hand, Harrie Brigham Chase and Jerome N. Frank, unanimously affirmed the judgment.

The opinion of the Circuit Court of Appeals for the Second Circuit is printed on pages 282, 283 and 284 of the record.

The Questions Involved.

The first three questions presented by the petition for writ of certiorari are no longer the subject of review by this Court.

The first three questions submitted in the petition deal with the interpretation of the Suits in Admiralty Act, 46, U. S. C. A., Sections 741, 742.

These questions have been finally disposed of by this Court in the case of *Brady* v. *Roosevelt Steamship Company, Inc.*, Number 269 of the October, 1942 Term, decided, January 18, 1943.

The Court below held in the case at bar that where a ship operator was a private corporation operating a vessel on its own behalf and not for the benefit of the United States Government, even though Government owned, that under such circumstances, the proper remedy was one under 46, U. S. C. A., Section 688 (The Jones Act), and not under Suits in Admiralty Act, 46, U. S. C. A., 741, 742.

But, since the decision by the Court below, this Court has gone further and has held that even where the vessel is operated on behalf of the Government by a private corporation, that Suits in Admiralty Act does

not apply, insofar as the tort of a private corporation is concerned.

Accordingly, an action by a seaman against his employer predicated upon the negligence of the private steamship company is properly brought under the Jones Act, irrespective of the fact that the Government is the owner of the vessel.

The fourth question presented is an inaccurate statement of the facts, as the record will show that the failure of light was only one factor of negligence, the one which prevented the seaman from seeing the dangerous condition created by the petitioner.

The question should have been stated as follows:

> Is evidence that shows that a shipowner failed to provide a seaman employed aboard his vessel with a reasonably safe place wherein to work, by reason of said shipowner creating a dangerous condition in a dark passageway without taking any steps to prevent an accident, sufficient to sustain a jury's verdict?

The fifth question raised is also inaccurately stated. The question should read:

> May reversible error be charged to a Trial Court for commenting in his charge on the medical evidence where no specific objection is taken to any part of the charge?

It is not error for a Trial Court to point out to the jury a conflict of evidence. If a party feels that a Trial Court has committed error in his charge to the jury, a specific objection must be taken to that portion of the charge deemed objectionable, failing which, error may not be charged to the Trial Court on the appeal.

The Facts.

The respondent was employed by the Moore-McCormack Lines, Inc., in the capacity of a marine engineer aboard the *S.S. Uruguay,* which was managed, controlled and operated by said Moore-McCormack Lines, Inc., and suffered injuries on the 26th day of June, 1939, while in the course of his employment aboard said vessel (R. pp. 3-4, 20, 21, 23, 236).

The accident was caused as a result of the petitioner failing to provide the respondent with a reasonably safe place wherein to work, in that a grate was removed and not replaced from the floor of the passageway in the starboard wing of the fireroom; and petitioner failed to provide any safeguards or give any warning to the respondent; and failed to provide any or adequate illumination, so that when Edward Foster started to walk through the passageway aforesaid, expecting a solid floor, he suddenly found himself falling through an opening several feet deep, where the grate had been removed and of which fact he had been kept in ignorance; nor could he see the dangerous condition, as the passageway was dark. The condition complained of had existed for several hours prior to the accident (R. pp. 25, 88, 89).

The petitioner denied liability and created a question of fact, which the jury resolved in the respondent's favor.

The Trial Court and the Circuit Court felt that there was ample evidence to sustain the jury's findings.

POINT I.

No principle is involved, or issue presented which this court should review or pass upon.

The Suits in Admiralty Act is applicable only in an action against the United States Government, or in a suit against a private corporation whose stock is entirely owned by the United States Government.

In the case at bar, the petitioner was a private corporation whose stock was not owned by the United States Government, and as a matter of fact, the vessel was not operated on behalf of the Government, but was operated on behalf of the business of a private corporation.

At no time prior to the judgment was the question of Government interest in the matter raised, and the record on appeal will show that there was no evidence that the United States was in any wise concerned in the action, or had any interest in the lawsuit, or would in any wise be called upon to pay the judgment or indemnify the petitioner in whole or in part.

The United States Government was not a party to the action and could not be made a party to the action as there was no liability against the United States Government.

The United States Government had no interest in the operation of the vessel, nor did it exercise any management, operation or control thereof, nor was it financially interested in any wise in the business of the defendant, or the outcome of the lawsuit.

However, since the petition was filed herein, the decision in the case of *Brady* v. *Roosevelt Steamship Company, Inc.* (*supra*), went further and held that a private corporation operating a Government owned vessel on behalf of the United States Government was still chargeable for its own personal torts.

There is no principle of law involved or question presented for this Court to pass upon as any doubt that might have existed has been clarified by the opinion in the case of *Brady* v. *Roosevelt Steamship Company, Inc.* (*supra*).

POINT II.

A disputed question of fact decided by a jury is not a subject for review by the United States Supreme Court.

The law is well settled as stated in the case of *Campana Corp.* v. *Harrison,* 114 F. (2d) 400, on page 405:

> "The reviewing Court does not review the evidence as an original fact finding tribunal; it does not attempt to settle conflicts in evidence or to determine questions of credibility."

McDonald v. *Pless,* 238 U. S. 264;
Hyde v. *U. S.,* 225 U. S. 347;
Mattox v. *U. S.,* 146 U. S. 140;
8 Wigmore, Evidence (3rd Ed. 1940) 668-677, 282 ff.;
Sunderland, Verdicts General and Special 29 Yale L. J. 253 (1919).

The charge by the petitioner that the Trial Court committed reversible error in his charge, is unsupported by the facts as the record will show that no specific exception was taken to any part of the Court's charge.

It is the well settled law that an objection to a Court's charge must state distinctly the matter to which the objecion is made and the grounds therefor.

Krug v. *Mutual Benefit & Acc. Ass'n.*, 120 F. (2d) 296;
Lynch v. *Oregon Lumber Co.*, 108 F. (2) 283;
Cohen v. *Evening Star Newspaper Co.*, 113 F. (2) 523;
McVeigh, 117 F. (2) 672.

Also:

Title 28, U. S. C. A., Section 723 C, Rule 51.

The question of error as to a portion of the Court's charge cannot be raised on appeal where no specific exception to any part of said charge was taken at the trial. Questions of error not raised at the trial may not be the subject of review by an Appeal Court.

This is not a matter for review by the United States Supreme Court.

It is a simple action by a seaman who was injured aboard a vessel through his employer's negligence, where a jury has resolved the facts in the seaman's favor, which verdict the Trial Court refused to disturb and which judgment based thereon, the Circuit Court of Appeals for the Second Circuit affirmed unanimously.

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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